

No. 12554

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THOMAS G. CHAMBERLAIN and CENTRAL HANOVER BANK
& TRUST COMPANY, as Successor Trustees Under the
Last Will and Testament of Samuel L. Clemens, de-
ceased, MARK TWAIN COMPANY and CLARA CLEMENS
SAMOSSOUD,

Appellants,

vs.

COLUMBIA PICTURES CORPORATION,

Appellee.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

*To the Honorable Judges of the United States Court of
Appeals for the Ninth Circuit:*

Your petitioner petitions for a rehearing of the judgment rendered herein on January 18, 1951, with a written opinion by Judge William E. Orr after a hearing before Judges Stephens, Bone and Orr.

Grounds.

I.

In making its decision, as indicated by the opinion, the court evidently took for granted that plaintiffs would not be able to prove certain facts which they had alleged in their complaint. Plaintiffs are entitled to have accepted as true, on a motion for dismissal of the complaint, the facts as alleged in the complaint.

II.

The Court has overlooked the true gravamen of the complaint. It is that defendant by falsely stating in its advertising of an inferior, poorly constructed, poorly made and badly told motion picture that it is based upon a Mark Twain story, whereas it bears only the remotest and most unfavorable resemblance thereto, directly injured plaintiffs who exclusively own and exploit all of the works of Mark Twain not in the public domain. This the opinion overlooks.

III.

The Court in making its decision has relied largely upon cases antedating the Lanham Act and in so doing has failed to accord to plaintiffs the greatly expanded statutory protection as therein granted not only to owners of trademarks but to anyone whose economic position is likely to be damaged by misrepresentations.

IV.

The Court's decision in so far as it expresses itself on the subjects of "palming off," "direct competition" and "property rights" fails to give proper weight to the modern expansion of the doctrines relating to pleading and proof of a cause of action in unfair competition and relating to the nature of property rights.

ARGUMENT I.

In Making Its Decision, as Indicated by the Opinion, the Court Evidently Took for Granted That Plaintiffs Would Not Be Able to Prove Certain Facts Which They Had Alleged in Their Complaint. Plaintiffs Are Entitled to Have Accepted as True, on a Motion for Dismissal of the Complaint, the Facts as Alleged in the Complaint.

Attention of the Court is respectfully called to that portion of its decision which states "in arriving at a conclusion as to whether the amended complaint states a cause of action *we take as true* all allegations well pleaded. We are not concerned with proof." (Emphasis ours.) The opinion then goes on "at first blush it might be said that the allegations made fit snugly into the provisions of *Sec. 1125 T. 15 U. S. C. A.*" But despite this specific statement of principles the opinion then goes on to indicate that the Court *disbelieves the truth* of the allegations. For example the opinion says "we could almost take judicial notice of the fact that the fame of 'Mark Twain' cannot be so easily marred." Appellant respectfully urges that this is not a matter for judicial notice but rather a matter of proof along lines that will be further expounded upon under a subsequent ground. That the writer of the opinion recognized that to take judicial notice in this manner would be improper is indicated by the subsequent statement "Of course we realize that a determination of the weight of the evidence that might be produced is not our function here." Yet the opinion in effect makes findings of fact contrary to the allegations of the complaint. Appel-

lant is entitled to his day in court which will certainly be denied him if he is not to be given his opportunity to make proof at trial of his allegations and to stand or fall upon such proof or failure thereof. A re-examination of its own opinion will, I think, convince this Court that in making its opinion it has been unduly swayed by its own views as to the extent of proof plaintiffs might be able to make at trial with respect to their allegations. It is the fact, and the opinion so distinctly states as above recited, that the case is one that falls squarely within the provisions of *Section 1125 T. 15 U. S. C. A.*, and naturally the allegations fit that section. The Court's opinion infers that the allegations were merely made to fit that section—and admits that they do so snugly—but apparently draws the conclusion that because the case as alleged is one that does fit so perfectly into the statute there must necessarily be no factual foundations for the allegations. This is indeed a strange and strained construction of the appellants' pleadings and in effect amounts to an accusation of false pleading in order to get one's case before the court.

Undoubtedly *Section 1125* was enacted in 1946 in the form as it now appears with situations in mind for which the statute is intended to give a remedy that did not earlier exist. We have such a situation in the case at bar. The situation has been alleged accordingly. Appellants are entitled to make proof at trial of those allegations. Since the allegations correspond to the statute if they are proved, the remedy not only exists but appellants become entitled to its benefits. This conclusion can be reached without the necessity for referring to any court decision which cannot, in any event, change the explicit language of the statute.

ARGUMENT II.

The Court Has Overlooked the True Gravamen of the Complaint. It Is That Defendant by Falsely Stating in Its Advertising of an Inferior, Poorly Constructed, Poorly Made and Badly Told Motion Picture That It Is Based Upon a Mark Twain Story, Whereas It Bears Only the Remotest and Most Unfavorable Resemblance Thereto, Directly Injured Plaintiffs Who Exclusively Own and Exploit All of the Works of Mark Twain Not in the Public Domain. This the Opinion Overlooks.

It would appear from the Court's decision that no weight whatsoever had been accorded the facts as alleged, and which it must be presumed could have been proved had the case been permitted to go to trial, that the making of a motion picture and describing it as "one of Mark Twain's favorite stories," as being based on a story written by Mark Twain, and as being "a story that only Mark Twain could tell" when none of this was true and when all of this false description was applied to an inferior picture, could not help but reflect adversely on and to damage directly the further useability of those of Mark Twain's stories of which plaintiffs are still the copyright owners—apart from the damage to the name "Mark Twain" as a trademark.

The trial court below and now this Court, judging by the former's remarks and the latter's opinion, seem to take the view without anything in the record to substantiate it, that the fame and reputation of Mark Twain and of his works cannot be diminished or damaged by any deleterious presentation of, by any false advertising of, or by any superimposition of the name "Mark Twain" on a work that is not his and which it is well-nigh libelleous

to describe as his because of its great inferiority. Since the Court's opinion is in part at least not based upon the record, appellants respectfully submit in the same vein that the veneration held by the court and counsel in this case for Mark Twain, based possibly upon an intimate acquaintance from youth with Mark Twain's works, more emphasized in days gone by than now, does not necessarily reflect the situation with regard to the newest generations and those yet unborn. The present generation and those to follow may well judge the standing of Mark Twain's stories by what they see in motion pictures, television or other media of visual presentation and if that which they see presented and advertised as a story of or based upon a story of Mark Twain, is of an inferior quality they, in their minds, having no shining childhood memories to fall back upon, may take it for granted that anything else they may see that bears the name of Mark Twain is likewise inferior and will refrain from patronizing any presentation of Mark Twain stories. Though this Court's opinion speaks of such a result as being a "nebulous, far-fetched conclusion" actually is this not a conclusion only in the absence of evidence that might very well be presented at trial to show that it is not at all nebulous and not at all farfetched for the fame of Mark Twain, a writer whose popularity was at its peak at the end of the 19th Century to be seriously dimmed in the 1950's by an inferior presentation such as defendant's accompanied by false and misleading advertising as to its authorship when viewed by a generation who did not in their lifetime know Mark Twain or whose schooling has not emphasized the worth of his works or whose reading has been confined largely to contemporary works.

Though it is true that anyone has the right to use the works of an author when they fall in the public domain,

this does not necessarily lead to the conclusion there is a right to apply to a garbled, distorted, adulterated, inferior and completely unrecognizable version a "label" that would lead the public to believe that this is a genuine Mark Twain story. To do so immediately detracts from the value of all of Mark Train's works in the public eye and certainly directly damages the owner of the copyrights of those of his works that are not yet in the public domain. The damage in each instance may be comparatively small but if permitted once it can be repeated a thousand-fold and sooner or later the destruction of value of the property rights remaining in plaintiffs will be complete. The defendant did not content itself with saying the story was "suggested" by one of Mark Twain's but stated categorically "that it was one of Mark Twain's favorite stories" or in another advertisement that the picture was based upon the Mark Twain story "The Celebrated Jumping Frog of Calaveras County," again "a story only Mark Twain could tell" or "Mark Twain's favorite story" and even went so far as to state that it was based on a story written by Mark Twain entitled "Best Man Wins." The last was an outright falsehood since none of Mark Twain's stories were ever so entitled, and the rest of the advertising was almost as completely false—as could best be illustrated at trial by viewing the motion picture and comparing it to Mark Twain's story "The Celebrated Jumping Frog of Calaveras County." It is not only that the public is being deceived but it is also that the public taste will be diverted away from Mark Twain stories entirely if the situation complained of by appellants in their complaint is not corrected. Plaintiffs have a direct and exclusive property interest in the copyrighted Mark Twain stories and they should certainly have the right to ask the Court to protect that interest by preventing false, misleading and

deceptive advertising which diminishes the residual value of all of Mark Twain's works. The appellants and they alone, own such copyrighted works, and they, and they alone, are the ones to be damaged, and who are being damaged. At the very least they are entitled to the requested relief for an injunction against the continuance of the false advertising. Appellants' injury is the injury spoken of in *Section 1125*, they being within the category of "any person who believes that he is or is likely to be damaged by the use of any such false description or misrepresentation." Even apart from such statutory authority for relief there can be no more basic principle than that for every wrong there must be a remedy. The obvious remedy in this case and the remedy which should be applied to all similar ones that might hereafter arise, is to enjoin the defendant from deceiving the public as to the true nature of that which it is selling so far as its derivation is concerned and by such injunction to prevent a loss of public goodwill and patronage for that great field of Mark Twain copyrighted works which belong exclusively to these plaintiffs and for the protection of which they, and they alone, are entitled to seek relief. For the defendant to resist such an injunction is for it to take the position that the law allows it to lie freely about the authorship of the stories on which its motion pictures are based, without regard to the persons or interests, public or private, which might thereby be not only misled but damaged. Conversely the imposition of such injunction could not damage defendant unless it is actually profiting by falsely trading on the name of Mark Twain. If it is so trading and if by such trade it is damaging plaintiffs, then plaintiffs are not only entitled to an injunction but also to damages. If it is not so trading then it should have no objection to the imposition of the injunction.

ARGUMENT III.

The Court in Making Its Decision Has Relied Largely Upon Cases Antedating the Lanham Act and in so Doing Has Failed to Accord to Plaintiffs the Greatly Expanded Statutory Protection as Therein Granted Not Only to Owners of Trademarks but to Anyone Whose Economic Position Is Likely to Be Damaged by Misrepresentations.

The cases referred to in the Court's opinion were decided prior to the Lanham Act of 1946 which includes *Section 1125 T. 15 U. S. C. A.* in its present form and these cases were decided in the light of the statutes as they then existed. The Lanham Act however, revolutionized the whole pattern of trademark registration, the basis for registration, and laid down new rules of business conduct. There has not yet grown up any considerable body of law interpreting the Lanham Act, but the intent of Congress in passing it was obviously to provide a drastic broadening of the basis for trademark registration and of relief for unfair business practices and that obvious intent should not be disregarded. Though there is little case law as yet available interpreting *Section 1125*, its language is so explicit and so clear that no interpretation should be required. Defendant does not and cannot deny that its representation of its picture "Best Man Wins" as being a story of Mark Twain is false. It is a false designation, description, and representation of origin. The complaint states, and it must be assumed on a motion for dismissal that it can be proved, that plaintiffs are persons who have a right to believe that they are damaged or are liable to be damaged by the use of such false description and representation and this without regard to whether they do or do not have or possess a valid trademark in the

name Mark Twain as such. By their false representations of origin coupled with an inferior production unworthy of the name Mark Twain, defendant has definitely damaged the plaintiffs who undeniably own a great body of Mark Twain's copyrighted works and who in addition have registered the name Mark Twain as a trademark and who have at least a record claim to the name Mark Twain as a trademark by their registration of it. In any event the remedies of *Section 1125* are not confined to those whose trademarks are violated but is extended equally to those whose economic position is injured by such false representation. This is precisely the case at bar. In enacting *Section 1125* Congress may well have had in mind the language of *Ely-Norris Safe Co. v. Mosler Safe Co.*, 7 F. 2d 603 at 604, wherein the Court said "there is no part of the law which is more plastic than unfair competition and what was not reckoned an actionable wrong 25 years ago may have become such today." The Court was not far off in its timing. That case was decided in 1925 and in 1946 the current legislation as herein referred to was passed. The basis of such legislation was more or less outlined in the following language from the same case "while a competitor may, generally speaking, take away all the customers of another that he can, there are means which he must not use. One of these is deceit. The false use of another's name as maker or source of his own goods is deceit of which the false use of geographical or descriptive terms is only one example * * * It is as unlawful to lie about the quality of one's wares as about the maker; it equally subjects the

seller to action by the buyer.” Though it is true that this case was subsequently reversed by the Supreme Court in *Mosler Safe Co. v. Ely-Norris Safe Co.*, 273 U. S. 132, as Judge Hand points out in his dissenting opinion in *California Apparel Creators v. Weider of California*, 162 F. 2d 893 at 902, the reversal did not affect the above quoted doctrines “which the Supreme Court did not disturb upon the appeal” but it was instead reversed because “the Supreme Court disagreed with our reading of the Bill of Complaint.” Incidentally as to the last cited case the 1946 trademark act was inapplicable since that case was based upon a situation arising prior to the effective date of that act. As the footnote in the *California Apparel* case points out, at page 900, “The Lanham Trademark Act of July 5, 1946, makes two important changes, in that it omits the requirement of wilfulness or intent to deceive and extends the liability ‘to a civil action’ by ‘any person who believes that he is or is liable to be damaged by the use of any such false description of representation’

* * * the amendment is expected to produce a more effective remedy.” It is most appropriate to further call attention to the dissenting opinion in the *California Apparel* case in which Judge Hand critically says, “We are affirming a summary judgment cutting off the plaintiffs from any trial because they have not been able in their affidavits to make out a *prima facie* case.” He then goes on to point out that cases relating to unfair competition are the last kind of action in which to invoke the remedy of summary judgment. Such remarks are particularly

pertinent when we take into consideration that in the case Judge Hand had under consideration the affidavits did not make out a *prima facie* case whereas in the case at bar the allegations of the complaint, if this Court were of the opinion they could be proved, would definitely make out a *prima facie* case under *Section 1125*. Appellants respectfully urge that this Court inadvertently misapprehended the nature of the remedy available to plaintiffs when it stated in its opinion "In order to entitle appellants to the relief sought it will be necessary for them to allege that they have an exclusive right to the use of the story in question." *Section 1125* obviously removes the necessity for proving a monopolistic right in plaintiffs. Furthermore the complaint is not based upon the use of the story "The Celebrated Jumping Frog of Calaveras County" by defendant but upon the fact that it purported to use such story but did not do so and instead produced a story which was not one of Mark Twain's works, was falsely represented to be such, was most inferior in nature and which combination of circumstances definitely damaged those holding property rights, in the name of Mark Twain and in his copyrighted works, to wit the plaintiffs. The cited language of this Court and that which follows "and they must be injured directly by appellee's acts" refers to the *Ely-Norris* case whose holding has now been superseded by the Lanham Act and is therefore no longer the law on the subject since the Act does not require proof of anything other than the fact that a person believes that he is or is *liable to be damaged* by a false description or representation.

As a general commentary on the entire situation involved in this case one can do no better than to refer to Daphne Robert's commentary on the Lanham Trademark Act appearing in *T. 15 U. S. C. A.*, at pages 285, 286, in which it is pointed out that "the new act gives to citizens and residents of the United States the same protection against unfair competition as has been afforded nationals under the Conventions and the acts which are made unlawful are those that are set out in the Conventions * * * 1. Every act of competition contrary to honest practice in industry or commercial matters; 2. All acts whatsoever of a nature to create confusion by no matter what means with the establishment, the goods, or the services of a competitor; 3. False allegations in the course of trade of a nature to discredit the establishment, the goods or the services of a competitor." The three subdivisions are cited from the International Convention. The author then cites similar and more detailed prohibited acts under the Inter-American Convention and then states "this constitutes the Federal Code of Unfair Competition under the new statutes." It is obvious in the instant case that that which the defendant is doing is contrary to honest practice in commercial matters, is definitely of a nature to create confusion as to what is and what is not a legitimate work of Mark Twain and constitutes false allegations in the course of trade of a nature which would definitely discredit the works of Mark Twain as controlled by plaintiffs.

ARGUMENT IV.

The Court's Decision Insofar as It Expresses Itself on the Subjects of "Palming Off," "Direct Competition" and "Property Rights" Fails to Give Proper Weight to the Modern Expansion of the Doctrines Relating to Pleading and Proof of a Cause of Action in Unfair Competition and Relating to the Nature of Property Rights.

As stated in Daphne Robert's "The New Trademark Manual", pages XIV and XV "Passing off is the sale of one man's goods as another's without copying his trademark. The development of law was in danger of being halted by this supposed limitation of the term unfair competition. Happily, unfair competition soon became applied to conduct which did not involve passing off. It was extended to include misappropriation of trade values as well as misrepresentation, and in general to acts which artificially and injuriously interfere with the normal course of trade." This view is supported in the cases of *Elastic Stop-Nut Corp. v. Green*, 62 Fed. Supp. 363, and *Lady Esther Ltd. v. Lady Esther Corset Shoppe*, 43 N. E. 2d 165. The law on this subject has been recently and ably expounded in *Metropolitan Opera Association, Inc. v. Wagner-Nichols Recorder*, 101 N. Y. S. 2d 483, and the facts in that case are in large measure appropos to the case at bar. In that case the Metropolitan Opera Assn., Inc., of New York had over a period of sixty years created a worldwide audience for its performances and thereby a large market for phonograph recordings and radio performances of its broadcasts. It sold to American Broadcasting Company the exclusive right to broadcast its performances and to Columbia Records the exclusive right to record its performances. The defendant made recordings

of the performances when radio broadcast and from these records made up recordings which they advertised and sold as records of broadcast Metropolitan Opera performances. The records were extremely inferior in nature and based upon their lack of quality alone Metropolitan Opera would not have approved their sale and release to the public. Metropolitan Opera was threatened with loss of revenue, however, since defendants were selling their inferior records at a price far below the market for records made under proper supervision and with proper attention to standards of artistic and technical excellence. The complaint asked for an injunction against the continuance of such practices as well as for damages and for an accounting. The defendants urged that the complaint failed to state a cause of action in that it did not allege that the defendants were "palming off" their recordings as those of plaintiffs or that plaintiffs were in competition with the defendants and further defended on the ground that plaintiffs had no property rights in the broadcast of performances and defendants were therefore free to record the performances and sell the recordings. The defendants filed a motion for dismissal which was heard together with plaintiffs' motion for preliminary injunction. The dismissal was denied and the injunction granted.

The Court in its opinion carefully analyzed the expansion of the doctrine of unfair competition, stating with respect to this doctrine "it is an outstanding example of the law's capacity for growth in response to the ethical as well as to the economic needs of society. As a result of this background the legal concept of unfair competition has evolved as a broad and flexible doctrine with the capacity to further growth to meet changing conditions

* * * The statement of a sufficient cause of action in

unfair competition, in the last analysis, is therefore dependent more upon the facts set forth and less upon technical requirements than in most causes of action.” The Court then points out that initially there was considered essential an allegation of “palming off” as being “the fraudulent representation of the goods of the seller as those of another.” The Court then states that the doctrine has extended far beyond the cases involving “palming off” and “the extension resulted in the creating of relief in cases where there was no fraud on the public but only a misappropriation for the commercial advantage of one person of a benefit or ‘property right’ belonging to another.” After citing cases at great length on the point at pages 489, 490 and 491 of the opinion the Court then concludes that “an allegation of ‘palming off’ is not essential to a cause of action for unfair competition.”

As to defendants objection that the complaint does not include an allegation that the parties are actual competitors the Court in the same case stated at page 492:

“the existence of actual competition between the parties is no longer a prerequisite [citing a long list of cases] * * * the modern view as to the law of unfair competition does not rest solely upon the ground of direct competitive injury but on the broader principle that property rights of commercial value are to be and will be protected from any form of unfair invasion or infringement and from any form of commercial immorality and a court of equity will penetrate and restrain every guise resorted to by the wrongdoer. The courts have thus recognized that

in the complex pattern of modern business relationships, persons in theoretically non-competitive fields may, by unethical business practices, inflict as severe and reprehensible injuries upon others as can direct competitors.”

In commenting on the defense that plaintiffs had no property rights which it could protect in the action, the Court in the same case called attention to the case of *Fisher v. Star Company*, 231 N. Y. 414, 132 N. E. 133, in which the New York Court of Appeals quoted the broad definition of a property right as laid down by the Supreme Court of the United States in *International News Service v. Associated Press*, 248 U. S. 215, 39 S. Ct. 68, 63 L. Ed. 211, and then stated at page 495:

“the court enjoined the defendants from using ‘Mutt and Jeff’ in connection with cartoons not drawn by the plaintiff. The reasoning of the court is of interest. It stated 231 N. Y. at page 433, 132 N. E. at page 139, 19 A. L. R. 937: ‘If appellant’s employees can so imitate the work of the respondent that the admirers of ‘Mutt and Jeff’ will purchase the papers containing the imitations of the respondent’s work, it may result in the public tiring of the ‘Mutt and Jeff’ cartoons by reason of inferior imitations or otherwise, and in any case in financial damage to the respondent and an unfair appropriation of his skill and the celebrity acquired by him in originating, producing and maintaining the characters and figures so as to continue the demand for further cartoons in which they appear.’ The reasoning is also applicable to the instant case.”

That reasoning is also applicable to the case at bar and peculiarly so.

In rejecting defendants' assertions that plaintiffs had no protectible property right the Court stated at page 498 "Equity will not bear witness to such a travesty of justice; it will not countenance a state of moral and intellectual impotency. Equity will consider the interests of all parties coming within the arena of the dispute and admeasure the conflict in the scales of conscience and on the premise of honest commercial intercourse."

Lastly on the subject of the preliminary injunction and very apropos of the arguments heretofore made in this petition, the Court at page 500 states:

"Such injury as may be inflicted on the defendants is the direct result of their unconscionable business practices and their invasion of the moral standards of the market place. The cry of the defendants that others similarly transgress does not confer immunity on them for their forbidden activities, nor may they find solace in the claim that they have not been guilty of common-law fraud. It already appears that this is not necessary. They have embarked upon a hazardous enterprise which equity will not hesitate to strike down. Cast in its proper environment, we have here a business venture purposed to gather in the harvest the seeds of which were planted and nurtured by others at great expense and with consummate skill."

"The conclusion here reached is not an onslaught on the currents of competition; it does not impose shackles on the arteries of enterprise. It simply quarantines business conduct which is abhorrent to good conscience and the most elementary principles of law and equity."

Conclusion.

Based upon the foregoing grounds as such grounds are largely summarized in the case of *Metropolitan Opera Association, Inc. v. Wagner-Nichols Recorder Corp.*, it seems evident that plaintiffs should be permitted to make proof of their allegations by evidence at trial, that far less harm and the least injustice can result by permitting the case to go to trial on its merits, that modern theory and practice, assuming plaintiffs' allegations be proved, would justify the relief prayed for by plaintiffs and appellants therefore respectfully urge that a rehearing be granted in this matter and that the Court's opinion be reconsidered.

Respectfully submitted,

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Attorney for Appellants,

NATHAN E. GILLIN,
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Certificate of Counsel Under Rule 25.

I hereby certify that in my opinion the grounds as stated in the foregoing petition for rehearing are well founded and said petition is not interposed for the purpose of delay.

HARRY E. SOKOLOV,
Attorney for Appellants.

